IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE-ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO.18 OF 2000

Bhatinda Chemicals Ltd. .
a company incorporated under the .
Companies Act, 1956 and having .
its registered office at Hazi .
Rattan Link Road P.O. Box No.71, .
Bhatinda, Punjab, India ....Plaintiffs .

V/s.

1. m.v. "X-PRESS NUPTSE",
   a motor vessel registered
   in a port other than one in
   India, flying a foreign flag
   along with her hull, gears,
   engines, tackle, bunkers,
   machinery, plant, furniture,
   equipment, appurtenances and
   paraphernalia and presently in
   Port JNPT and within the
   jurisdiction of this Hon'ble
   Court.

2. Fintas Shipping Company Ltd.,
   A company incorporated under
   the foreign Laws and having
   its place of business at C/o
   Marconsult Bereederungs GMBH
   Grosse Elbstrasse 36,22767
   Hamburg, Germany.

3. Any person or persons who may
   be concerned, either beneficially
   or otherwise with the first
   defendant vessel ....Defendants

Mr.S.Sen i/b Mr.Manoj R. Khatri for the Plaintiffs.

Mr.Rahul Narichania i/b Bhatt & Saldhana for the Defendants.

CORAM: S.J.VAZIFDAR, J.
DATED: 13TH/14TH FEBRUARY, 2006.

ORAL JUDGMENT :-

1. The Plaintiffs have filed the suit for arrest of the vessel m.v. "X-PRESS NUPTSE", the first Defendant and for a decree against the Defendants in the sum of US $ 63,760=21 together with interest thereon at the rate of 12% p.a. from the date of the suit till payment. Defendant No.2, Fintas Shipping Company Limited is the owner of the said vessel.

2. Original Defendant No.2 was described as "Any person or persons who may be concerned either beneficially or otherwise with the first Defendant vessel". Thereafter an order of arrest was passed on 4.5.2000. The charterer M/s.Express Container Lines (U.K.) Ltd. appeared at the hearing of the Notice of Motion on 10.5.2000. By an order dated 10.5.2000, the learned Judge permitted the vessel to be released on Defendant No.1 furnishing a bank guarantee. Pursuant to an order dated 14.9.2000 the owners of Defendant No.1 - Fintas Shipping Company Limited were impleaded as Defendant No.2. Original Defendant No.2 was continued as Defendant No.3. The reference hereafter to the Defendants is restricted to Defendant Nos.1 and 2.

3. I will first set out the Plaintiffs' case. The Plaintiffs claim to be the consignees in relation to a consignment of 260 bags of Irani Pistha (hereinafter referred to as the "said goods") initially containerised for shipment from Dubai, U.A.E. and to be discharged at Mumbai. A bill of lading dated 10.4.2000 was issued by Balaji Shipping (UK) Ltd. Ivory Foodstuff Trading L.L.C., Dubai was shown as the shipper and the Plaintiffs were shown as the consignees and parties to be notified. The agent's address in Mumbai was the address of one NLS Agency (India) Pvt.Ltd. The intended port of loading was Dubai and the place of delivery was Mumbai. Defendant No.1 was shown as the intended vessel. The bill of lading also described the goods under the caption "SAID TO CONTAIN". The box at the bottom of the bill of lading on the right side contained the following provision :-

> "Received in apparent good order and condition except as otherwise noted the total number of Containers or packages or units enumerated to be transported to such place of receipt as agreed,authorised or permitted herein subject to all the terms and conditions appearing on the front and reverse of this Bill of Lading to which the Merchant agrees by accepting this Bill of lading, any local privileges and customs notwithstanding."

The clause, part of which I have extracted above, contained at the foot thereof the words : " Signed on

behalf of the carrier". Below these words the word "by" is printed. Along side the word "by" appears the seal of one Albatross Shipping Co. LLC. Below the seal is the name "ALBATROSS SHIPPING CO. LLC." & below that is the stamp with the words : "AS AGENTS FOR CARRIER BALAJI SHIPPING (U.K.) LTD."

The front of the bill of lading also has the following clause :

> "**JURISDICTION AND LAW CAUSE :**
>
> ANY CLAIM UNDER THIS BILL OF LADING SHALL BE SUBJECT TO ENGLISH LAW AND DECISIONS OF ENGLISH COURTS SHALL ONLY APPLY. CLAIMS FILED OTHER THAN ENGLISH COURTS SHALL NOT BE ENTERTAINED".

The conditions of carriage on the reverse of the bill of lading define carrier to mean the party on whose behalf the bill of lading had been signed.

. Clause 32 which appears on the reverse of the bill of lading reads as under :-

> "32. DEMISE CLAUSE. If the ship is not owned or chartered by demise to the Company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the owner or demise charter as the case may be as Principal made through the agency of the said Company or Line who act as agents only and shall be under no personal liability

whatsoever in respect thereof."

4. The Plaintiffs have further alleged that they took necessary steps to ensure that the shipment was as per the norms ; that a debit memo dated 8.4.2000 was raised upon them by the foreign shipper. The plaint merely states that the payment was required to be made as arranged. Nothing further is stated in the plaint regarding what the arrangement was - the significance of which I will deal with later.

The Plaintiffs accepted the documents received from the Punjab National Bank. The Plaintiffs claim to be entitled to take delivery of the consignment on the basis of the endorsement in their favour on the reverse of the bill of lading.

The Plaintiffs contacted M/s.NLS Agency (India) Pvt.Ltd., the vessel’s local agent and called upon them to issue delivery orders M/s.NLS Agency (India) Pvt. Ltd. informed the Plaintiffs that they were awaiting instructions from their principal’s office regarding issuance of the delivery orders. The Plaintiffs were also consignees/holders of the bills of lading in respect of three other shipments under three different bills of lading. The Plaintiffs’ advocate addressed a notice dated 19.4.2000 to M/s.NLS Agency

(India) Pvt.Ltd. Thereafter delivery orders in respect of three consignments were given to the Plaintiffs and the Plaintiffs collected the cargo thereunder. In respect of the said consignment, the Plaintiffs were informed by M/s.NLS Agency (India) Pvt.Ltd. that the container was not on board the first Defendant. Non-delivery of the cargo in these circumstances is the Plaintiffs' cause of action for the reliefs claimed in the suit.

5. The Defendants filed a written statement after furnishing the security as aforesaid. In the first instance, the Defendants have pleaded certain facts pursuant to which orders were passed by the Court in Dubai attaching the container. The Defendants have stated that it appears that the Plaintiffs had purchased the cargo from Ivory Foodstuff Trading L.L.C. who in turn had purchased the same from Abid Khosh Trading Company LLC Dubai. Ivory Foodstuff Trading LLC took delivery of the cargo and issued two cheques for the value thereof. The cheques however were dishonoured. Abid Khosh Trading Company LLC Dubai therefore filed a suit in the Dubai Court for revocation of the sale contract between them and Ivory Foodstuff Trading LLC, for refund of the price of the said goods and for attachment of the cargo. At the

hearing, Ivory Foodstuff Trading LLC remained absent. On 11.4.2000/22.4.2000 an order was passed by the Dubai Court attaching the container on the vessel, which was then at the Port of Rashed. The Dubai Court by a letter/order dated 24.4.2000 issued instructions to the Harbour Operation Management to permit the Court Bailiff to break open the container. By a final order and judgment the Dubai Court decreed the claim of Abid Khosh Trading Company LLC Dubai and sustained the attachment order. According to the Defendants, it was in view of the aforesaid orders that the cargo was offloaded and carried to the warehouse of Abid Khosh Trading Company LLC Dubai. The Defendants submitted that they had no option but to comply with the orders of the Dubai Courts and they cannot therefore be held responsible or liable for the consequences arising from the said orders.

6. The Defendants also denied the particulars of the cargo stated in the bill of lading. They have denied that M/s.NLS Agency (India) Pvt.Ltd. were their agents. They submitted that the declarations and in fact all the contents of the bill of lading are by Balaji Shipping (U.K.) Ltd. and not by them and therefore they are not bound by the declarations contained in the bill of lading. They submitted that

there was no privity of contract between the Plaintiffs and themselves. The Defendants have also denied the averments and the submissions based on the said Clause 32 on the reverse of the bill of lading.

7. The Defendants have further contended that the Plaintiffs have no cause of action against them and that they chartered the said vessel to M/s.Express Container Lines (U.K.) Ltd. by a charter dated 3.5.1999. The Defendants' case is that the bill of lading was issued by Balaji Shipping (U.K.) Ltd. and not by them ; that since the contract of affreightment was with Balaji Shipping (U.K.) Ltd., the Plaintiffs' cause of action, if any, would only be against them and not against the Defendants. The Defendants stated that the bill of lading had not been issued by or on their behalf or by on behalf of M/s.Express Container Lines (U.K.) Ltd. The Defendants had no connection whatsoever with Balaji Shipping (U.K.) Ltd. The Plaintiffs had deliberately failed to join Balaji Shipping (U.K.) Ltd., a necessary party and that no order of arrest could be issued against the Defendants' vessel for the dues of the third party.

8. The following issues were framed/reframed with consent :-

I S S U E S

1(a) Whether the Plaintiffs prove that they were consignees in relation to 260 bags of Irani Pistha as alleged in Paragraph 3 of the plaint?

(b) Whether the Plaintiffs prove that they were entitled to take delivery o f the said cargo?

2. Whether the Plaintiffs prove that the value of the cargo is US$ 63,700.21 as alleged in paragraph 4 of the plaint?

3. Whether this Court has no jurisdiction to receive, try and dispose off this suit as alleged in paragraph 17 of the written statement?

4. Whether the Plaintiffs have no cause of action as alleged in paragraphs 4, 5, 9 and 14 of the written statement?

5. Whether the alleged contract of affreightment was frustrated and/or whether the Plaintiffs cannot enforce the same against the Defendants

for the reasons and as alleged in paragraph 6 of the written statement?

6. Whether the suit should be dismissed because of non-joinder of a necessary party as alleged in paragraph 5 of the written statement?

7. What reliefs, if any, is the Plaintiffs entitled to?

8. What orders?

. The issues were however settled subject to the following qualification stated in the same order dated 24.1.2006 :-

"II. It is however, clarified that issue No.2 is subject to Mr.Sen’s objection that the Defendants cannot now be permitted to urge this point regarding the contents and value of the cargo as no issue to this effect was raised when the parties went to trial. Mr.Narichania on the other hand submitted that though no issue was raised he is entitled to urge this point in view of the fact that the evidence in this regard was led and that the Plaintiffs were aware that this was a point in dispute.

III. This aspect will be considered and decided at the hearing".

9. The Plaintiffs led the evidence of one Navdeep Gupta by filing his affidavit in lieu of examination-in-chief. The Defendants did not lead any evidence. They however, cross-examined the Plaintiffs' witness extensively. The evidence was recorded on commission by Satish J. Shah, an advocate of this Court. He has filed his report on 1st June, 2003. There is no challenge to the report or to anything that is stated therein. The Commissioner's report records that during the cross-examination, the Defendants tendered various documents which were taken on record and marked as Exhibits as set out below.

10. The learned Commissioner thereafter stated :- "I enclose herewith the following :

1. The notes of cross-examination ;

2. The minutes of the proceedings of each day (2 days) ;

3. The original affidavit of

examination-in-chief of Mr.Navdeep Gupta together with the annexures thereto ;

4. The following documents tendered by the Defendants during cross-examination ;

(i) letter dated 15th July, 2002, from Mr.Khatri to M/s.Bhatt & Saldanha (marked Exhibit ‘D-1’) ;

(ii) Copy of order dated 24th April, 2000, passed by the Court of First Instance, Dubai, in Case No.1213/2000 (Provisional Attachment) together with an official translation thereof (marked Exhibit ‘D-2’) ;

(iii) Judgment delivered by the Court of First Instance, Dubai, on 24th June, 2000, in Case No.205 of 2000 (Commercial Claim)."

11. It would be convenient to deal with issue No.5 first.

ISSUE NO.5 :

5. Whether the alleged contract of affreightment was frustrated and/or

whether the Plaintiffs cannot enforce the same against the Defendants for the reasons and as alleged in paragraph 6 of the written statement?

. Mr.Narichania, the learned counsel appearing on behalf of the Defendant submitted that though the goods were initially loaded on board the vessel, they had to be offloaded pursuant to and in compliance with the orders and directions of the Court at Dubai.

12. It is clear that the learned Commissioner inadvertently did not mark item 4 (iii) above viz. "Judgment delivered by the Court of First Instance, Dubai, on 24th June, 2000, in Case No.205 of 2000 (Commercial Claim)" as Exhibit D-3. It is nobody's case that there was any objection when the evidence was being recorded to the documents. It is not the Plaintiffs' case that the Commissioner wrongly did not record an objection to the document. No objection was therefore recorded by the Commissioner in this regard.

13. Before noting the contents of the orders of the Dubai Court, it would be convenient to consider Mr.Sen's, objection on behalf of the Plaintiff, in

regard thereto. Mr.Sen submitted that a foreign judgment can only be proved in the manner prescribed in Sections 74 (1) (iii), 78(6) and 86 of the Indian Evidence Act, 1872 which read as under :-

> "74. **Public documents.** - The following documents are public documents :-
>
> (1) Documents forming the acts, or records of the acts -
>
> (i) .....
>
> (ii) .....
>
> (iii) of public officers, legislative, judicial and executive, (of any part of India or of the Commonwealth), or of a foreign country ;"
>
> 78. **Proof of other official documents -** The following public documents may be proved as follows:-
>
> (1) .....
>
> (2) .....
>
> (3) .....
>
> (4) .....
>
> (5) .....
>
> (6) Public documents of any other class in a foreign country , -
>
> by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of (an Indian Consul) or diplomatic agent, that the

> copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.
>
> **86. Presumption as to certified copies of foreign judicial records.-** The Court may presume that any document purporting to be a certified copy of any judicial record of (any country not forming part of India) or of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the (Central Government) (in or for) (such country) to be the manner commonly in use in (that country) for the certificate of copies of judicial records.
>
> (An officer who, with respect to any territory or place not forming part of (India or) Her Majest's dominions, is Political Agent therefore, as defined in section 3, (clause (43)), of the General Clauses Act, 1897 (10 of 1897), shall for the purposes of this section, be deemed to be a representative of the (Central Government) (in and for the country) comprising that territory or place).

14. The submission is unfounded for two reasons. Firstly the documents were tendered in evidence. They were received and marked in evidence. There was no objection to the documents being received and marked in evidence. In view thereof, it was not necessary for the Defendants to prove the same. The provisions

of Sections 74, 78 and 86 of the Indian Evidence Act would apply where foreign judgments and orders are disputed or objected to being received in evidence for any reason. It is not necessary for a party to prove a foreign judgment or order if there is no objection to the same being received and marked in evidence.

15. Secondly, the facts necessary in support of Mr.Narichania's contention have been admitted by the Plaintiffs' witness in his cross-examination.

. The Plaintiffs' witness has admitted the fact of the said orders of the Dubai Courts in his cross-examination.

16. I must preface a consideration of the evidence of the Plaintiffs' witness by noting a few facts which are important not only to this issue but to some of the other issues as well. Initially, the Plaintiff had filed the affidavit in lieu of examination-in-chief of its Chief Executive one Krishan Bansal. The affidavit was affirmed on 4.6.2001 and was served upon the advocate of Defendant Nos.1 and 2 under cover of the Plaintiffs' advocates letter dated 20.6.2002. Mr.Narichania prior to commencing the cross-examination of the witness,

though not bound to, put the Plaintiff to notice that if Bansal was not produced for cross-examination, the Defendants would contend that an adverse inference ought to be drawn against the Plaintiff for non-production of Bansal for cross-examination. The same was recorded by the Commissioner.

17. I will now revert to the evidence of the Plaintiffs witness admitting the orders of the Dubai Court. It would be convenient to quote the evidence in this regard.

"110 Q) The said affidavit in paragraph 23 also says as follows "The Defendants have failed to comply with their obligation under the contract. They were well aware of the Dubai Court's order, but yet failed and neglected to inform the consignee of this".

A) Yet it is true to my mind also.

111 Q) You are therefore aware that the Doubt Court ordered and directed the said container containing the said purported consignment to be attached and retained at the port ?

A) Yes, at a later stage but only after the arrest of the vessel, it has come to our notice that there was any Dubai Court order in this case though we have nothing to do with the Dubai Court's order.

112 Q) Would you agree that orders or judgment of courts of law are to be respected and abided by ?

A) Yes of course.

113 Q) So if the order was followed and abided by off loading the said consignment from the

first defendant vessel, the party complying with the order of the court cannot be said to have acted wrongfully and illegally ?

A) Yes of course."

114 Q) (Shown certified copies of order passed by Dubai Court dated 24th June 2000 alongwith English transaction thereof at first instance and an order from Courts department at first instance dated 24th April 2000 together with an English translation thereof). Would you agree that under these two orders the consignment would not be carried on board the first defendant vessel to Mumbai ?

A) No, I do not agree.

115 Q) Why do you not agree ?

A) When the Bill of Lading issued in our name mentioning the container as "shipped on board", the first defendant vessel has to deliver the goods to us at Mumbai. The defendants have to inform us in time about the happenings at Dubai since they have not at all informed us about the same, we are entitled to get the delivery of the vessel at Mumbai Port. Further, the Courts order shown are not gone through by me as we are not at all concerned with the Courts order at Dubai and also there is no mention of our company Bhatinda Chemicals Ltd. Bhatinda, in these court’s order and these Court’s order are not at all binding upon our company".

18. The affidavit referred to in question 110 was filed by the said Bansal on 4.6.2001. The affidavit dated 4.6.2001 was affirmed/signed and forwarded to the Defendants’ advocate. Subsequently the Plaintiffs sought to withdraw the affidavit. Bansal was not even examined. The answer to question 110 itself indicates that the Plaintiffs were aware of and had admitted the

said orders of the Dubai Court. The answer to question 111 reinforces the fact of existence of the Dubai Court's order. The answer to questions 112 and 113 supports the Defendants' case that in view of the orders of the Dubai Court, they could have done nothing in the matter. Of course, even had the witness answered otherwise, it would not have made any difference for obviously the Defendants were bound to obey the order of the Dubai Court. In the unlikely event of the Defendants obstructing the execution of the order, the same would have been enforced in any event.

. The answer to question 114 is not only contrary to the answer to questions 112 and 113 but is also incorrect.

19. The answer to question 114 is relevant for another reason. It establishes that the orders of the Dubai Court were not only tendered, received and marked in evidence without any objection but they were even relied upon in the cross-examination. Even during the cross-examination the same were put to the witness without any objection from the plaintiffs. The doubt, if any about the orders of the Dubai Court being proved in evidence is thus removed.

20. The matter does not rest here. It goes further. I am inclined to accept Mr.Narichania's contention that the Plaintiffs were aware of the orders of the Dubai Court before they filed the suit.

21. Mr.Narichania's submission that an adverse inference must be drawn against the Plaintiff is well founded. There is no justifiable reason for not producing Bansal for cross-examination after tendering his affidavit in lieu of examination-in-chief. In fact in view of the cross-examination, which I shall now refer to, even if Bansal had not filed an affidavit in lieu of the examination-in-chief, the Defendants would have been entitled to contend that an adverse inference ought to be drawn against the Plaintiffs, even for non-production of Bansal as a witness.

22. The witness in answer to question 3 admitted that he was not personally involved in the suit transactions. He stated that he was informed about it by his Managing Director. He further stated that he became aware of the transactions only when the Plaintiff's bankers received the documents. His contention thereafter that he became conversant with

the facts of the case is incorrect. Factually he admittedly therefore had no connection with either the formation or execution thereof except to the extent of what he was allegedly told by the Managing Director and from the file of the case. This is clear from the witnesse's answer to questions 2 to 6. In answer to question 7, he admitted that Bansal was handling the commercial activities of the company regarding sales and purchase of the goods. In answer to question 8, he admitted that Bansal was still in the employment of the Plaintiffs.

23. It is clear therefore, that Bansal was the Chief Executive of the Plaintiffs. It was Bansal, who handled the commercial activities of the company regarding sales and purchase of the goods including the suit transactions. It is Bansal, who initially filed the affidavit. He is still in the employment of the Plaintiffs. In these circumstances, the withdrawal of this affidavit and refusal to produce Bansal for cross-examination leads to an adverse inference that had he been produced for cross-examination, his evidence would have disclosed that the Plaintiffs were aware of the orders of the Dubai Court prior to the filing of the suit. For the same reasons the adverse inference would have been

justified even if Bansal had not filed the said affidavit as he was obviously one of the persons who had personal knowledge of the material facts.

24. To over come this difficulty, the witness in his answers to questions 8 to 17 deposed that Bansal was not produced for cross-examination as he had not been feeling well for about two to three years and was advised by the doctor not to travel. No doctor's certificate was produced in evidence. The witness was not even aware of the nature of Bansal's illness. This is indeed curious. The sheer improbability of this deposition is exposed by the witnesse's answers to questions 11 and 12 which read as under :-

"11 Q) Why did your company decide to present him as a witness when he is purportedly ill for the past 2-3 years and purportedly unable to travel?

A) Actually he was not so ill at that time. The doctors advised him for strict compliance of their advice for the last one-year or so.

12 Q) Where did you get this information?

A) From Mr.Krishan Bansal himself."

25. The witnesse's answers to questions 13 and 14 show that he not only prevaricated but refused to answer pertinent questions. When he was asked whether he gave instructions for the withdrawal of Bansal's affidavit, he stated that he did not know about that. When he was asked in question 14, whether he gave reasons to the advocate for Bansal's inability to attend Bombay to give evidence, he stated that he did not know about that. The question was simple and clear. The answers were an attempt at avoiding them. I am inclined to disbelieve the witnesse's evidence.

26. The witness stated that he was not even aware that the Plaintiffs' advocate by a letter dated 15.7.2002 to the Defendants' advocate stated that Bansal's affidavit would not be tendered in Court. Even assuming that the witness was not aware of the same, it would not carry the Plaintiffs' case any further. In that event, it was all the more reason for the Plaintiffs' to have led the evidence of a person other than the witness to at least establish why Bansal could not be produced for giving evidence.

27. It is pertinent to note that the letter dated 15.7.2002 (Exhibit D-1) itself furnished no reasons

whatsoever for the withdrawal of Bansal's affidavit.

28. Non-production of Bansal or any other witness who was personally aware of the matter assumes great importance on the question as to whether the Plaintiffs were aware of the orders of the Dubai Courts prior to filing of the suit. The cross-examination of the witness especially his answer to questions 26 to 43 establishes the same.

29. The witness stated that the Plaintiffs in fact stopped business with Ivory Foodstuff Trading L.L.C. due to this dispute. The witness admits that there were disputes regarding non-delivery of the consignment between Ivory Foodstuff Trading L.L.C. and the Plaintiffs. He stated that the Plaintiffs dealt with one Praveen Mittal of Ivory Foodstuff Trading L.L.C. It is important to note that the witness also admitted that the Plaintiff contacted Ivory Foodstuff Trading L.L.C. before filing the present suit. In answer to question 13, he admitted that the Plaintiffs contacted Ivory Foodstuff Trading L.L.C. regarding the same after being informed by NLS Agency (India) Pvt. Ltd. that the container was not loaded at Dubai. The suit was filed on 4.5.2000 and the ship was arrested on the same day. In answer to

question 41, the witness stated that he was not aware of the exact date of the arrival of the ship but admitted that the Plaintiffs had enquired about the container from the agents of Ivory Foodstuff Trading L.L.C., NLS Agency (India) Pvt. Ltd., in the correspondence between them between 13.4.2000 and 19.4.2000. It is another matter that he subsequently admitted that the correspondence between 13.4.2000 and 19.4.2000 did not disclose any such enquiry. I will presume that such enquiry was made between 13.4.2000 and 19.4.2000. It is difficult to believe that no enquiry was made by the Plaintiffs with Ivory Foodstuff Trading L.L.C. as to the reason for the cargo not being shipped.

30. Added to this and of crucial importance is the fact that the witness admitted that he was not the one who made the enquiries with Ivory Foodstuff Trading L.L.C. regarding non-delivery of the cargo upon being informed that the same was not on board the ship. He stated that the enquiry was made telephonically. It is important to note that in answer to question 32, he stated that this enquiry was made either by Bansal or by one Rajinder Mittal, the Managing Director of the Plaintiffs. Neither of them have been examined. Their evidence would have been

crucial in this regard. The witness has stated that they had 3-4 telephonic conversations in that behalf. He stated that he did not know what was discussed.

31. In these circumstances, I have little hesitation in accepting Mr.Narichania's submission that an adverse inference ought to be drawn against the Plaintiffs for having failed to examine Bansal and Rajinder Mittal to the effect that had they been examined, it would have been established that they were aware of the reason for the cargo not being shipped prior to the suit being filed.

32. Issue No.5 is therefore answered in the affirmative.

ISSUE NO.1 :

1(a) Whether the Plaintiffs prove that they were consignees in relation to 260 bags of Irani Pistha as alleged in Paragraph 3 of the plaint?

(b) Whether the Plaintiffs prove that they were entitled to take delivery of the said cargo?

33. There is no dispute that the Plaintiffs were

shown as the consignees on the bill of lading. The Defendants have in paragraph 10 of the written statement denied the Plaintiffs' case that they were consignees in relation to the said consignment. In view of my finding on issue No.4, this question however is academic. I have come to the conclusion that there was no privity of contract between the Defendants and the Plaintiffs arising from the bill of lading. In that view of the matter the mere fact that the Plaintiffs were shown as consignees would make no difference to the ultimate decision. Had the Defendants been liable qua the bill of lading, this issue would have been relevant. If I had come to the conclusion that the Defendants were liable on the basis of the bill of lading, I would have held that the Plaintiffs had established that they were the consignees in relation to the said consignment. Issue No.1 is answered accordingly.

ISSUE NO.2 :

2. Whether the Plaintiffs prove that the value of the cargo is US$ 63,700.21 as alleged in paragraph 4 of the plaint?

34. Mr.Sen submitted that in the written

statement Defendant No.1 admitted the value of the cargo to be US$ 63,700.21 as stated in the bill of lading. He relied upon the fact that in paragraph 3 of the plaint, the Plaintiffs had expressly stated that the bill of lading specified further and better particulars as regards the said consignment meaning thereby the value of the consignment as well. In paragraph 8 of the plaint, the Plaintiffs had reiterated the value of the consignment. The consignment was valued at US$ 63,760.21 and that the Plaintiffs were entitled to a decree in the said sum for non-delivery. In the written statement, there is no denial as regards the value of the cargo. Even in the last sentence of paragraph 10 of the written statement all that is stated is that the Plaintiffs were put to strict proof of the particulars stated in the bill of lading. The written statement does not even deal with paragraph 8 of the plaint, which specifically deals with the valuation of the cargo. In paragraph 3 of his affidavit in lieu of examination-in-chief, the Plaintiffs' witness referred to and tendered a debit note dated 8.4.2000 for the said sum.

35. Mr.Narichania on the other hand submitted that the Plaintiffs had not proved the value of the

said consignment.

36. I am inclined to accept Mr.Sen's argument regarding the valuation of the consignment on the ground that in the written statement, there is no denial of the value of the consignment. It is pertinent to note that prior to the issues framed by me, issues had been framed on 21.3.2001. There was no issue regarding the valuation. This was obviously for the simple reason that there was no denial of the valuation. It is for this reason, that in my order dated 24.1.2006 I clarified that issue No.2 would be subject to Mr.Sen's objection. The Defendants cannot now be permitted to urge the point regarding valuation, as no issue to this effect was raised when the parties went to trial.

37. In the circumstances, issue No.2 is answered in the affirmative and in favour of the Plaintiffs.

ISSUE NO.3 :

3. Whether this Court has no jurisdiction to receive, try and dispose off this suit as alleged in paragraph 17 of the written statement?

38. Paragraph 17 of the written statement is in answer to paragraph 18 of the plaint. Paragraph 18 of the plaint states that the first Defendant vessel was presently within the jurisdiction of this Court and that this Court was conferred with the necessary territorial jurisdiction to receive, try and dispose of the present suit. Paragraph 17 of the written statement denies that this Court has jurisdiction as alleged "for the reasons stated in paragraphs hereinabove". It is thus clear that the ground on which the Defendants denied that this Court has jurisdiction is "for the reasons stated in the paragraphs hereinabove".

39. Paragraphs 1 to 16 of the plaint do not deal with the question of territorial jurisdiction. Mr.Narichania argued this issue based on the jurisdiction clause in the bill of lading. That clause was not pleaded specifically. It was not even pleaded impliedly. It was never contended by the Defendants that this Court has no jurisdiction on the basis of the jurisdiction clause in the bill of lading.

40. A defence of jurisdiction based on such a clause would depend on a variety of circumstances as

is evident from the judgment of the Supreme Court in the case of *British Steam Navigation Co. Ltd. v. Shanmughvilas Cashew Industries, 1990(48) E.L.T. 481 (S.C.)*. There was in that case a similar clause as to exclusive jurisdiction of the English Courts. After considering the English Law and International Law the Supreme Court came to the conclusion that in the facts of that case it was unlikely that the first Respondent i.e. the Plaintiff would be without any remedy in the English Courts. This aspect was neither pleaded nor even urged before me. It is one of the facts to be taken into consideration. Though there may be an exclusive jurisdiction clause, as held by the Supreme Court there may be strong reasons for the Court not to hold the parties as being bound by the jurisdiction clause which they have agreed to.

. Further in paragraph 26 the Supreme Court held as under :-

> "26. In the instant case the question is of initial jurisdiction on the basis of clause 3 of the bills of lading. We have to ask the question whether the shipper could or could not have the right to sue at Cochin under the bills of lading. If he could not have done so, the appellant's appearance to protest about jurisdiction would not cure that defect of jurisdiction. However, we find that in the Memo of

> appeal before the lower appellate court no specific ground as to jurisdiction was taken though there was grounds on non-maintainability of the suit. Even in the Special Leave Petition before this Court no ground of lack of jurisdiction of the courts below has been taken. We are, therefore, of the view that the appellant has to be held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction in the facts and circumstances of the case. The defence that the suit was not maintainable in the absence of the owner of the ship could in a sense be said to have been on the merits of the case. The submission as to lack of jurisdiction is, therefore, rejected."

41. In the present case too, as stated above, no ground of territorial jurisdiction based on the said clause had ever been taken. In the circumstances, it must be held that the Defendants have to be held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction in the facts and circumstances of the case.

42. Issue No.3 is therefore answered in the negative and against the Defendant.

ISSUE NO. 4 :

4. Whether the Plaintiffs have no cause of action as alleged in paragraphs 4, 5, 9 and 14 of the

written statement?

43. Mr.Sen submitted that the fact that the bill of lading was issued is admitted. It was also admitted that the cargo was loaded on the ship. He further submitted that there was no evidence to show that the ship was chartered to any party. The statement in paragraph 4 of the written statement that the vessel was chartered to M/s.Express Container Lines (U.K.) Ltd. vide a charter party dated 3.5.1999 had not been proved according to Mr.Sen. Further he submitted that there was no pleading by the Defendants as to how and under what contract the goods had been taken on board. Mr.Sen submitted that the Plaintiffs are not aware of the relationship between the Defendants and Balaji Shipping (U.K.) Ltd. ; Balaji Shipping (U.K.) Ltd. had arranged with the Defendants to ship the goods on the vessel and to issue the bill of lading and that there was no other document or contract relied upon by the Defendants to establish the relationship between the Defendants and Balaji Shipping (U.K.) Ltd.

44. The aforesaid facts according to Mr.Sen led to the conclusion that the cargo was loaded on the ship pursuant to and in accordance with the bill of

lading.

45. That being so, Mr.Sen submitted that the Defendants were liable in view of clause 32 on the reverse of the bill of lading, extracted earlier.

46. At the out-set it must be mentioned that Mr.Sen conceded that it was not his case that the mere issuance of a bill of lading by Balaji Shipping (U.K.) Ltd. established any privity of contract between the Plaintiffs and the Defendants. The question therefore for consideration is whether the aforesaid circumstances indicated by Mr.Sen establishes privity between the parties herein. He conceded that if they did not, the Defendants would not be liable on the bill of lading.

47. I am unable to agree with Mr.Sen. There is nothing on the basis of the record which establishes any privity between the Defendants and the Plaintiffs. It is not the Plaintiffs' case that the privity was established on the basis of any oral or other documentary evidence between themselves and the Defendants. It was for the Plaintiffs to establish any contractual relationship between themselves and the Defendants. This they have failed to do.

48. Mr.Sen also conceded that it is not necessary that the only manner in which the cargo could have been loaded on board the first Defendant vessel was pursuant to the suit bill of lading. He conceded that the cargo could have been loaded pursuant another arrangement such as for instance one between the Defendants and Balaji Shipping (U.K.) Ltd. It is not the Plaintiffs' case that they made any enquiries in this regard but that the same remained unanswered.

49. It is pertinent to note that the plaint is absolutely silent regarding any privity of contract between the Plaintiffs and the Defendants based on the bill of lading or otherwise. If for instance the Plaintiffs had pleaded any such privity, the Defendants would have been required to establish the defence, if any, thereto. In the circumstances, it was not even necessary for the Defendants to do so.

50. Mr.Sen stated that the charter party referred to in the written statement had not been established. This would have been relevant had the Plaintiffs averred and established that the cargo was loaded by the Defendants pursuant to and in accordance with the suit bill of lading alone. They have failed to do so.

Reliance upon clause 32 of the bill of lading is therefore misplaced. The Plaintiffs have not established the facts necessary for invocation of clause 32. I will assume that the Plaintiffs have established that the vessel was not owned by the charterer or demised to the company. In that event the bill of lading would take effect as a contract "with the owner or demise charterer as the case may be as Principal made through the agency of the said company." There is no evidence before me to suggest that in respect of the vessel there was no demise charter. In the circumstances, it is not possible to establish whether the owner or the demise charterer is liable.

51. In this view of the matter, it is not necessary to refer to the judgment of the *House of Lords,* in the case of - *Homburg Houtimport B.V. v. Agrosin Private Ltd.and others, 2003 Vol.1, 571* or of the Supreme Court in *British India Steam Navigation Co.Ltd. v. Shanmughavilas Cashew Industries, 1990 (48) E.L.T. 481 (S.C.)*, relied upon by Mr.Narichania and Mr.Sen respectively.

52. In this regard, it is also pertinent to note the answer of the witness to questions 151 and 152

which are as follows :-

151 Q) I put it to you that there is no contractual relationship between defendant No.1 and 2 on one hand and the plaintiffs on the other?

A) Yes I agree that there was no direct contractual relationship.

152 Q) I put it to you that in absence of privity of contract with Defendant No.2, neither the first defendant vessel nor its owners i.e. Defendant No.2 are liable to the plaintiffs?

A) No it is not true since the vessel was carrying the container as a transporter they were fully liable."

53. In view of the finding that there was no privity of contract between the Plaintiffs and the Defendants, I am in agreement with Mr.Narichania that the doctrine of incorporation by reference cannot and does not arise.

54. Lastly, the cross-examination of the witness clearly established that M/s.NLS Agency (India) Pvt.

Ltd. was the agent of Balaji Shipping (U.K.) Ltd. and not of the Defendants. I may only mention that admittedly there is no cause of action based either on tort or bailment.

55. Issue No.4 is therefore answered in the affirmative and in the Defendants' favour.

ISSUE NO.6 :

6. Whether the suit should be dismissed because of non-joinder of a necessary party as alleged in paragraph 5 of the written statement?

56. The issue of non-joinder does not really arise. If the Defendants were liable on the basis of the bill of lading, there would have been no non-joinder merely because Balaji Shipping (U.K.) Ltd. was not made a party. However, I have already held that the Plaintiffs have no cause of action against the Defendants. The issue is answered accordingly.

ISSUE NO.7 :

7. What reliefs, if any, is the Plaintiffs entitled to?

57. The Plaintiffs are not entitled to any

reliefs.

ISSUE NO.8 :

8. What orders?

58 (i). In the circumstances, the suit is dismissed with costs through-out.

(ii). The Prothonotary and Senior Master is directed to refund the entire amount lying in Court together with interest, if any, to the advocate of Defendant Nos.1 and 2 on behalf of Defendant Nos.1 and 2.

(iii). Liberty to Defendant Nos.1 and 2 to adopt appropriate proceedings for the purpose of enforcing the undertaking tendered in accordance with Rule 951 of the Bombay High Court (Original Side) Rules.

59. The operation of this order and judgment is stayed for a period of four weeks from today to enable the Defendants to challenge this order in Appeal.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE-ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO.18 OF 2000

DATE OF DECISION : 13TH/14TH FEBRUARY, 2006.

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?

2. To be referred to be Reporter or not ?